

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

DAVID P. ASMUS

v.

**BOARD OF ASSESSORS OF
THE CITY OF WORCESTER**

Docket Nos. F321721 (FY 2013)

Promulgated:
June 21, 2017

This is an appeal under the formal procedure, pursuant to G.L. c. 58A, § 7, and G.L. c. 59, §§ 64 and 65, from the refusal of the Board of Assessors of the City of Worcester (the "assessors" or the "appellee") to abate taxes on a certain improved parcel of real estate located in the Worcester Airport Industrial Park at 170 Goddard Memorial Drive, in Worcester (the "subject property"), leased by and assessed to David P. Asmus (the "appellant") under G.L. c. 59, §§ 11 and 38, for fiscal year 2013.

Commissioner Chmielinski heard this appeal. Chairman Hammond and Commissioners Rose and Good joined him in the decision for the appellant.

These findings of fact and report are made pursuant to a request by the appellee under G.L. 58A, § 13 and 831 CMR 1.32.

David P. Asmus, pro se, for the appellant.

John F. O'Day, Jr., Esq., Assistant City Solicitor, for the appellee.

FINDINGS OF FACT AND REPORT

The appellant presented his case-in-chief through his testimony and the introduction of two exhibits: (1) a written background statement authored by the appellant with supporting documentation; and (2) the Airport Industrial Park Lease (the "Lease") applicable to the subject property, which, among other things, limits the use of the subject property to light manufacturing.¹

The assessors' case-in-chief consisted of the testimony of Worcester's Assessor, William Ford, which included his admissions that: (1) the city's income-valuation analysis was premised on an office as opposed to a light manufacturing occupancy; (2) the configuration of the subject building did not easily support an office use; and (3) the Lease restricted the use of the subject property to light manufacturing. The assessors also introduced the requisite jurisdictional documents, as well as: their property record and income-valuation cards for the subject property; two listings for the subject property; and an undated description of the engineering services provided by the appellant's company, Asmus Engineering Services, along with its mission and address at the subject

¹ The appellant originally signed the Lease for Advanced Manufacturing Technologies, Inc. as its President or authorized representative. This entity was dissolved in 1991.

property. Based on this evidence, the Appellate Tax Board (the "Board") made the following findings of fact.

On January 1, 2012, the valuation and assessment date for fiscal year 2013, the appellant was the long-term lessee and assessed owner of an 8.86-acre parcel of land situated in the Worcester Airport Industrial Park with an address of 170 Goddard Memorial Drive (the "subject parcel"). At all relevant times, the subject parcel was improved with an approximately 10,000-square-foot light manufacturing building (the "subject building"). For assessment purposes, this property is identified on map 47 as block 18, parcel 0 (the parcel and building together comprise the "subject property").

For fiscal year 2013, the assessors valued the subject property at \$797,500, and assessed tax thereon at the commercial rate of \$30.85, in the amount of \$24,602.87. In accordance with G.L. c. 59, § 57C, the appellant timely paid the tax due without incurring interest. In accordance with G.L. c. 59, § 59, the appellant timely filed an abatement application on January 30, 2013, which the assessors denied on April 1, 2013. In accordance with G.L. c. 59, §§ 64 and 65, the appellant seasonably filed his appeal with this Board on June 2, 2013.² On this basis, the Board found and ruled that it had jurisdiction over this appeal.

² The assessors, in accordance with G.L. c. 58A, § 7A, timely transferred the appellant's informal appeal to the Board's formal procedure.

As the appellant explained, in 1988, he was a professor at Worcester Polytechnic Institute and the Director of its Robotics Center. In that same year, he started an independent venture business applying robotics to industrial applications. To house this new venture, he secured a sixty-year lease from the City of Worcester for the subject parcel and built the subject building on it. Shortly thereafter, the manufacturing sector experienced a significant downturn causing him to abandon his new business venture and obtain a more stable job in the private sector. He then leased the subject building to the Central Massachusetts Special Educational Collaborative (the "Collaborative") which used the subject building as an educational facility.

In 2006, the Collaborative terminated its occupancy, and the appellant attempted to sell the subject building along with his leasehold interest in the subject parcel. The appellant negotiated a purchase and sale agreement with a prospective purchaser who intended to use the subject property as a training center for autistic children. The parties agreed upon a sale price of \$675,000 and set a closing date. In preparing for the closing, it came to light that Worcester had transferred its

interest in the subject parcel and Lease to the Massachusetts Port Authority ("MassPort"). When the appellant and prospective purchaser approached MassPort to approve the sale pursuant to the Lease, MassPort balked because it ostensibly did not want children near the airport and because the Lease limits the use of the subject property to light manufacturing.

The appellant then commenced discussions with MassPort for its purchase of the subject building and buy-out of the Lease for which MassPort offered \$285,000 in October, 2013. The appellant has continued to actively market the property through a licensed real estate broker with no success. The broker confirmed that the light manufacturing restriction in the Lease, coupled with MassPort's refusal to allow any other uses, as well as the design of the subject building renders the subject property "extremely difficult to sell or lease."

The assessors did not contradict or contest the appellant's assertions with respect to the Lease restrictions, MassPort's refusal to lift them, the negotiations between the appellant and MassPort, or the difficulty in selling or leasing a property so designed and encumbered. The assessors acknowledged that in their income-capitalization methodology, they had valued the subject property under an office-use scenario as opposed to a light-manufacturing one, which resulted in a higher net income and lower capitalization rate than appropriate, thereby

overvaluing the subject property for the fiscal year 2013. The property record card pertaining to the subject property indicates that the assessors had valued the subject building and the subject parcel at \$678,600 and \$118,900, respectively, for fiscal year 2013.

Based on all the evidence, the Board ultimately found that the appellant met his burden of proving that the subject property was overvalued for the fiscal year at issue. The Board found that the \$285,000 offer from MassPort to purchase the subject building and remaining leasehold interest represented the best evidence of the subject building's value for the fiscal year at issue and the assessed value attributed by the assessors to the subject parcel was the best evidence of its value for the fiscal year at issue. The Board found that the assessors' income-capitalization analysis was seriously flawed and resulted in an excessively high value for the subject property because it was premised on an incorrect highest and best use and did not account for certain lease restrictions on the subject property imposed and enforced by a governmental entity. Moreover, neither party introduced evidence supporting an income-capitalization approach premised on a light manufacturing use for the subject property.

Under the circumstances, the Board determined that the best evidence of the subject property's value for fiscal years at

issue was MassPort's estimate of the subject building's value and remaining leasehold quantified in its offer, in conjunction with the corresponding assessed value of subject parcel. The Board therefore found and ruled that the value of the subject property was \$403,900 for fiscal year 2013. Accordingly, the Board decided this appeal for the appellant and abated \$12,142.56 for fiscal year 2013.

OPINION

The assessors are required to assess real estate at its fair cash value as of the first day of January preceding the start of the fiscal year. G.L. c. 59, §§ 2A and 38. Fair cash value is defined as the price on which a willing seller and a willing buyer in a free and open market will agree if both are fully informed and under no compulsion. ***Boston Gas v. Assessors of Boston***, 334 Mass. 549, 566 (1956).

The appellants have the burden of proving that the property has a lower value than that assessed. "'The burden of proof is upon the petitioner to make out its right as [a] matter of law to [an] abatement of the tax.'" ***Schlaiker v. Assessors of Great Barrington***, 365 Mass. 243, 245 (1974) (quoting ***Judson Freight Forwarding v. Commonwealth***, 242 Mass. 47, 55 (1922)). "[T]he board is entitled to 'presume that the valuation made by the assessors [is] valid unless the taxpayers . . . prov[e] the

contrary.'" **General Electric Co. v. Assessors of Lynn**, 393 Mass. 591, 598 (1984) (quoting **Schlaiker**, 365 Mass. at 245).

"Prior to valuing the subject property, its highest and best use must be ascertained, which has been defined as the use for which the property would bring the most." **Tennessee Gas Pipeline Co. v. Assessors of Agawam**, Mass. ATB Findings of Fact and Reports 2000-859, 875 (citing **Conness v. Commonwealth**, 184 Mass. 541, 542-43 (1903); **Irving Saunders Trust v. Assessors of Boston**, 26 Mass. App. Ct. 838, 843 (1989) (and the cases cited therein). In determining fair market value, all uses to which the property was or could reasonably be adapted on the relevant assessment date should be considered. **Newton Girl Scout Council, Inc. v. Massachusetts Turnpike Authority**, 335 Mass. 189, 193 (1956). If a property is particularly well-suited for a certain use that is not prohibited, then that use may be reflected in an estimate of fair market value. **Colonial Acres v. North Reading**, 3 Mass. App. Ct. 384, 386 (1975). According to the authoritative valuation treatise, APPRAISAL INSTITUTE, THE APPRAISAL OF REAL ESTATE (13th ed. 2008), highest and best use is defined as "[t]he reasonably probable and legal use of vacant land . . . that is physically possible, appropriately supported, and financially feasible and that results in the highest value." **Id.** at 277-78.

In the present appeal, the Board found and ruled that, for *ad valorem* tax purposes, the subject property's highest and best use was as a light manufacturing facility. The Lease with the City of Worcester and later, with MassPort, both governmental entities, still had over thirty years to run as of the relevant valuation and assessment date, and that Lease restricted the use of the subject property to light manufacturing. See **Kahn v. Assessors of Brookline**, Mass. Appellate Tax Board Findings of Fact and Reports 2004-403, 441, citing **Parkinson v. Assessors of Medfield**, 398 Mass. 112, 116 (1986) (recognizing that government restrictions may impact a property's value). Any other use would, in the Board's view, be highly speculative. Moreover, the assessors acknowledged as much at trial.

Generally, real estate valuation experts, the Massachusetts courts, and this Board rely upon three approaches to determine the fair cash value of property: income capitalization; sales comparison; and cost reproduction. **Correia v. New Bedford Redevelopment Auth.**, 375 Mass. 360, 362 (1978). However, "[t]he board is not required to adopt any particular method of valuation." **Pepsi-Cola Bottling Co. v. Assessors of Boston**, 397 Mass. 447, 449 (1986).

Actual sales of the subject property generally "furnish strong evidence of market value, provided they are arm's-length transactions and thus fairly represent what a buyer has been

willing to pay for the property to a willing seller.” **Foxboro Associates v. Assessors of Foxborough**, 385 Mass. 679, 682 (1982); **New Boston Garden Corp. v. Assessors of Boston**, 383 Mass. 456, 469 (1981); **First National Stores, Inc. v. Assessors of Somerville**, 358 Mass. 554, 560 (1971). And while mere offers are generally not considered strong evidence of the value of a property because they only represent one party’s view of its value, where, as here, the market is so constrained that the only viable purchaser is the governmental entity imposing or enforcing the market restrictions, the Board considered the offer from that entity to be probative on fair cash value. See THE APPRAISAL OF REAL ESTATE at 365 (“In addition to recorded sales and signed contracts, appraisers should consider . . . offers to purchase [even though] offers provide less reliable data than signed contracts and completed sales . . . [and] [o]ften the final sale price is . . . higher than the initial offer to buy.”). The Board then added the assessed value of the land component to that offer, as the best evidence of the subject parcel’s value, because, in the Board’s view, the offer did not account for the full fee simple value of the subject property.

Accordingly, the Board calculated the value of the subject property as follows:

	<u>Offer</u>	<u>Land Assessment</u>	<u>Fair Cash Value</u>
Fiscal Year 2013	\$285,000	\$118,900	\$403,900

In making its various findings and rulings in this appeal, the Board was not required to believe the testimony of any particular witness or to adopt any particular method of valuation suggested. Rather, the Board could accept those portions of the evidence that the Board determined had more convincing weight. *Foxboro Associates*, 385 Mass. at 682; *New Boston Garden Corp.*, 383 Mass. at 469. "The credibility of witnesses, the weight of the evidence, and inferences to be drawn from the evidence are matters for the board." *Cummington School of the Arts, Inc. v. Assessors of Cummington*, 373 Mass. 597, 605 (1977).

The Board applied these principles in reaching its ultimate finding and ruling that the appellant successfully demonstrated that the subject property was overvalued for the fiscal year at issue. On this basis, the Board decided this appeal for the appellant and abated \$12,142.56 in real estate taxes.

THE APPELLATE TAX BOARD

By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: _____
Clerk of the Board